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No. 97-594

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNISYS CORPORATION,

Petitioner

v.

CESKA SPORITELNA, A.S.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF FORD MOTOR COMPANY, EASTMAN KODAK COMPANY, AND SHELL OIL COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CESKA SPORITELNA, A.S.,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

MOTION OF FORD MOTOR COMPANY, EASTMAN KODAK COMPANY AND SHELL OIL COMPANY FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, Ford Motor Company, Eastman Kodak Company and Shell Oil Company move for leave to file the accompanying brief as *amici curiae* in support of the petition for writ of certiorari.[1] All three corporations do business internationally, often acting through corporate subsidiaries and affiliates in order to comply with local laws of foreign countries, and to maximize the legal, regulatory, tax and business consequences of transactions subject to the laws of more than one country. All three corporations frequently employ binding arbitration as the

1. As required by Supreme Court Rule 37.6, *amici curiae* on this brief inform the Court that this brief was authored in substantial part by counsel for Unisys Corporation, defendant and petitioner in this matter. However, counsel for the three corporations participating as *amici* in support of Unisys' petition have all reviewed and provided input on this submission, and affirm that its contents represent their position on the issue of the arbitrability of claims against non-signatory corporate affiliates. Unisys Corporation made monetary contributions to the preparation and submission of this brief.

method for resolving disputes in international transactions, in order to avoid the uncertainty of being subject to the jurisdiction of multiple fora.

The decision of the Third Circuit to deny arbitration to non-signatory corporate parents of contract parties is in conflict with the doctrine developed in most other courts of appeals in the federal system. Each of the three corporations participating as *amici* have principal places of business in different states, and will likely be subject to jurisdiction in different circuits. If the Third Circuit's exception to the non-signatory doctrine adhered to by other courts of appeals remains good law then the enforceability of arbitration agreements entered into by corporate subsidiaries in *international* transactions will hinge on inconsistencies in *national* law. Corporations participating in international commerce need definitive resolution of the question presented by Petitioner in order to gauge the dependability of contracted for dispute resolution mechanisms, which this Court has treated as integral to international transactions.

Petitioner Unisys Corporation has consented to the filing of this brief. Ceska Sporitelna, a.s., respondent to this petition, and plaintiff below, refused consent. Therefore, Ford Motor Company, Eastman Kodak Company and Shell Oil Company request leave to file the accompanying brief as *amici curiae.*

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF FORD MOTOR COMPANY, EASTMAN KODAK COMPANY, AND SHELL OIL COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DESCRIPTION AND INTEREST OF *AMICI CURIAE*

The corporations participating as *amici curiae* in support of the petition of Unisys Corporation are all multinational enterprises which do business through subsidiaries in foreign countries. Ford Motor Company ("Ford") is incorporated in Delaware, with a principal place of business in Dearborn, Michigan. Ford manufactures, distributes and sells vehicles throughout the world, typically acting through wholly owned subsidiaries. In addition, Ford has equity interests in two foreign automobile manufacturers, Mazda Motor Corporation and Kia Motors Corporation. Ford is also one of the largest providers of financial services worldwide through corporate affiliate Ford Credit and related businesses, and owns one of the world's largest rental vehicle companies, Hertz Corporation.

Eastman Kodak Company ("Kodak") is incorporated in New Jersey, with a principal place of business in Rochester, New York. Kodak also manufactures, distributes and sells its

products worldwide, typically acting through wholly owned subsidiaries. Kodak operates more than 100 subsidiaries in more than forty countries in Europe, Africa, Asia, and North and South America.

Shell Oil Company ("Shell") is an indirectly, wholly owned subsidiary of two foreign holding companies, Royal Dutch Petroleum Company, incorporated in the Netherlands, and Shell Transport and Trading Company PLC, incorporated in England. Shell is incorporated in Delaware, with a principal place of business in Houston, Texas. Shell is a direct or indirect owner of numerous subsidiary companies engaged in international commerce relative to the exploration and development of oil and gas resources, and marketing of petrochemicals.

All companies participating in this brief *amici curiae* have an interest in ensuring the sanctity of arbitration agreements freely entered into by companies engaging in international commerce, and the consistent enforcement of such agreements in the federal courts of appeals. Subsidiaries of Ford, Kodak and Shell frequently enter into international transactions, an important condition of which is often a non-judicial dispute resolution mechanism that prospectively establishes the forum and the law to be applied. The rule established by the Third Circuit, that non-signatory parent corporations can never benefit from the arbitration agreements that their subsidiaries enter into, will, as a practical matter, render arbitration agreements meaningless because the litigant which seeks to avoid such terms will always be able to locate a non-signatory corporate presence against whom to plead its claim. Accordingly, *amici* submit this brief in support of the petition for certiorari in order to protect and further their interest in ensuring the sanctity of prospectively crafted dispute resolution mechanisms.

SUMMARY OF ARGUMENT

Unisys Corporation ("Unisys") is litigating in federal court a dispute arising out of a computer project that was sold under an agreement requiring all disputes to be resolved through arbitration. The lawsuit has remained in federal court because the claims, which would certainly be considered arbitrable if pleaded against the Unisys subsidiary which signed

the agreement, were pleaded against a Unisys entity – the parent company, Unisys – with which the plaintiff Ceska Sporitelna, a.s. ("CS") did not contract. Both the district court and the court of appeals have taken a very formalistic approach that limits application of the arbitration clause, intended for all disputes arising out of the project, to only disputes pleaded against the contract parties.

This Court has recognized in numerous decisions how important it is for corporations doing business in international markets to be able to prospectively arrange where disputes arising out of their transactions will be decided. If, as occurred in the Unisys-CS case, a party which has agreed to arbitrate disputes arising out of a project can escape that commitment simply by alleging misconduct against an entity affiliated with the contract party, then the contractual commitment to arbitrate will be swallowed by the loopholes through it.

The personnel and resources of multinational corporations are sufficiently fluid that it will almost always be the case that multiple entities in the corporate structure will contribute to or oversee the projects formally entered into by one corporate entity; indeed, that circumstance is generally beneficial to the party receiving services from the multinational. Any legal rule requiring deference to a contractual commitment to arbitration must be developed consistent with the business reality that multinational corporations, while operating through distinct legal entities, overlap the functions of the various entities in support of their products and services.

The majority of federal circuits have developed a practical rule for enforcing arbitration agreements when parties that have entered into such agreements attempt to avoid their commitment by pleading against a non-signatory affiliate. Where the claims against the non-signatory, whether cast as contract or tort claims, arise out of, or are intertwined with, the contract containing the arbitration clause, courts have extended the arbitration clause to the non-signatory affiliate, in express recognition of the fact that the arbitration clauses will otherwise easily be rendered meaningless.

The Third Circuit has taken the position in the Unisys-CS case that this widely followed practical doctrine has no appli-

cation where the non-signatory seeking to benefit from the arbitration clause is the parent corporation of the signatory. This position is inconsistent with cases in other Circuits, and is an illogical limitation on the extension of arbitration clauses to non-signatories — a rule that the Third Circuit adheres to in at least some circumstances. It is crucial that this Court establish a uniform rule for application of the non-signatory doctrine so that businesses are not subject to inconsistent treatment of dispute resolution agreements depending on the location in which they are incorporated and doing business.

In making that determination, the Court must be sensitive to the fact that in the absence of a non-signatory doctrine, there is no practical arrangement for business transactions that could be instituted by corporate entities operating in the international market that would insure the application of dispute resolution mechanisms against clever pleading. If arbitration clauses are to have meaningful effect in international commerce, where this Court has given them greatest deference, this Court must grant Unisys' petition for certiorari and reverse the Third Circuit's narrow and formalistic reading of the parties commitment to arbitrate.

STATEMENT OF THE CASE

Amici adopt the statement of the case as set forth in the petition for certiorari.

ARGUMENT

I. CORPORATIONS MUST BE ABLE TO DETERMINE PROSPECTIVELY THE FORUM FOR DISPUTES ARISING OUT OF INTERNATIONAL BUSINESS TRANSACTIONS

The Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.*, is "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The "federal policy [in favor of arbitral dispute resolution] applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

The reason that the Court places special emphasis on arbitration clauses in the international context is that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Mitsubishi Motors Corp.*, 473 U.S. at 631 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974)). Prospective determination of how disputes are to be adjudicated is particularly important "[i]n the context of international contracts [because] the opportunities for increasing the cost, time and complexity of resolving disputes are magnified by the presence of multiple possible fora, each with its own different substantive rules, procedural schematas, and legal cultures." *Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218, 223 (1st Cir. 1995); *see also Scherk*, 417 U.S. at 517 ("[T]he dicey atmosphere of such a legal no-man's land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of business to enter into international commercial agreements."); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11-13 (1972)("Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter."); *David L. Threlkeld & Co. v. Metallgesellschaft, Ltd.*, 923 F.2d 245, 248 (2d Cir. 1991)("Enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation. The parties may agree in advance as to how their disputes will be expeditiously and inexpensively resolved should their business relationship sour."); Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 Int'l Lawyer 187, 188 (1989)("Forum shopping, a concern in the U.S. domestic context, offers entirely new possibilities for manipulation of a dispute in the international context.")

II. THE NON-SIGNATORY DOCTRINE DEVELOPED IN OTHER CIRCUITS IS NECESSARY TO PROTECT ARBITRATION AGREEMENTS AGAINST CLEVER PLEADING

United States corporations often engage in international transactions through the use of a foreign subsidiary. Where that is the case, the non-signatory entities in the corporate structure will be vulnerable to litigation regarding the transaction — either because they did participate in the transaction, or because they can simply be alleged to have done so. In anticipation of either scenario, corporations will want to insure that claims pleaded against all members of the corporation be directed to the forum identified in the contract's dispute resolution clause. Otherwise entities entering into foreign transactions would expose themselves to the uncertainty of legal fora and foreign laws and procedure, which, as this Court has stated, is exactly what dispute resolution clauses are designed to avoid.

In recognition of the fact that corporations entering into transactions through subsidiaries do seek to prospectively control where disputes arising out of those transactions will be adjudicated, even where it is contemplated that non-signatory corporate members will participate in the transaction, most courts confronted with a lawsuit arising out of or intertwined with a contract containing an arbitration clause have applied the arbitration clause to the benefit of non-signatories. *Sunkist Soft Drinks v. Sunkist Growers,* 10 F.3d 753 (11th Cir. 1993), *cert. denied,* 513 U.S. 869 (1994); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells,* 9 F.3d 1060 (2d Cir. 1993); *Arnold v. Arnold Corp.-Printed Communs. for Bus.,* 920 F.2d 1269 (6th Cir. 1990); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.,* 863 F.2d 315 (4th Cir. 1988); *McBro Planning and Dev. Co. v. Triangle Elec. Constr. Co.,* 741 F.2d 342 (11th Cir. 1984); *In re Oil Spill By the "Amoco Cadiz", etc.* 659 F.2d 789 (7th Cir. 1981); *Hughes Masonry Co. v. Greater Clark Cty. School Bldg. Corp.,* 659 F.2d 836 (7th Cir. 1981); *Sam Reisfeld & Son Import Co. v. S.A. Eteco,* 530 F.2d 679 (5th Cir. 1976). This doctrine has also been recognized in dicta in decisions where the claims were not sufficiently intertwined with the contract

containing the arbitration clause to warrant extending the arbitration clause to the non-signatories. *See, e.g., Thomson-CSF, S.A. v. American Arbitration Ass'n,* 64 F.3d 773 (2d Cir. 1995); *Britton v. Co-Op Banking Group,* 4 F.3d 742 (9th Cir. 1993).

Courts that have employed the non-signatory rule have recognized that it is a necessary safeguard against tactical pleading around arbitration clauses, converting breach of contract suits against contract parties into fraud claims against affiliated non-signatories. *See, e.g., "Amoco Cadiz",* 659 F.2d at 796; *McBro Planning,* 741 F.2d at 343-44 ("[I]t is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract."); *Sam Reisfeld & Son Import Co.,* 530 F.2d at 681 ("If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."); *Chase v. Check,* 158 F.R.D. 59, 63 (E.D. Pa. 1994)("[The] [non-signatory] rule . . . makes sense because if plaintiffs can avoid the practical consequences of an agreement to arbitrate by naming non-signatory parties as defendants . . . the effect of the rule requiring arbitration would, in effect, be nullified.'"); *Vitzethum v. Dominick & Dominick, Inc.,* Nos. 94 Civ. 4938, 95 Civ. 429, 1996 WL 19062, * 7 (S.D.N.Y. Jan. 18, 1996) ("Plaintiffs cannot escape enforcement of the arbitration agreement simply by suing the parent [non-signatory] rather than [the subsidiary non-signatory]."); *see also* Scott M. McKinnis, *Enforcing Arbitration With A Nonsignatory: Equitable Estoppel And Defensive Piercing Of The Corporate Veil,* 1995 J. Disp. Resol. 197, 211 (1995)("[A] corporation will not be allowed to avoid the effects of an arbitration clause based on the non-signatory status of defendants while simultaneously asserting claims against the non-signatory party arising from the same contract."); *cf. Lu v. Dryclean-USA of California, Inc.,* 14 Cal. Rptr. 2d 906, 908 (Ct. App. 1992)("To hold [that the fact that the non-signatories did not sign the Agreement renders the forum selection clause unenforceable] would be to permit a plaintiff

to sidestep a valid forum selection clause simply by naming a closely related party who did not sign the clause as a defendant.")

III. THE THIRD CIRCUIT'S APPLICATION OF THE NON-SIGNATORY DOCTRINE IS INCONSISTENT WITH OTHER CIRCUITS AND CREATES UNCERTAINTY FOR CORPORATIONS DOING BUSINESS IN INTERNATIONAL COMMERCE

Until recently, the Third Circuit appeared to be in step with the other circuits in terms of taking a practical approach towards applying arbitration clauses to non-signatories where the claim against the non-signatory was intimately related to the contract containing the arbitration clause. In *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith,* 7 F.3d 1110 (3d Cir. 1993), the court held that an arbitration clause in an asset management contracts applied to a non-signatory corporate affiliate of the contract party that had provided services in support of the contracts. *Id.* at 1122. The court, applying "agency logic" to the facts before it, held that "[w]here the parties to [an arbitration clause] unmistakably intend to arbitrate all controversies which might arise between them, their agreement should be applied to claims against agents or entities related to the signatories." *Id.* Had this reasoning been applied to the Unisys-CS case, the federal suit would certainly have been dismissed in favor of arbitration.

Between the time that *Pritzker* was issued and the disposition of Unisys' motion and appeal, the Third Circuit decided *Dayhoff, Inc. v. H.J. Heinz Co.,* 86 F.3d 1287 (3d Cir.), *cert. denied,* — U.S. —, 117 S. Ct. 583 (1996). In *Dayhoff,* the plaintiff stated various contract and tort claims arising out of the termination of a candy distribution contract by a subsidiary of the Heinz Company prior to the sale of assets by Heinz to Hershey Foods. The court held that the arbitration clause bound only the single Heinz subsidiary that had contracted with the plaintiff, and that subsidiary's successors in interest, but not other defendants sued by the plaintiff.

Defendants from the Heinz Corporation (which had owned the signatory defendant during the time that the parties negotiated, performed, and terminated the contract) and

defendants from Hershey (which had no involvement with contract negotiation or performance) argued that the arbitration clause should be extended to claims against them. 86 F.3d at 1295-96. Both the parties and the court focused their attention on the Hershey defendants. *Id.*, n.7. The decision not to extend the arbitration clause to those defendants fits cleanly within the prevailing application of the non-signatory rule, as the conduct alleged was subsequent and external to the contracts containing the arbitration clause. *See, e.g., Thomson-CSF, S.A.*, 64 F.3d at 777 (declining to apply non-signatory rule because claim that parent purchased signatory subsidiary in order to eliminate plaintiff which had exclusive agreement to supply equipment with subsidiary "can hardly be characterized as arising out of or being integrally related to the . . . Agreement"); *Britton*, 4 F.3d at 748 (declining to apply non-signatory rule because "acts [alleged] are subsequent, independent acts of fraud, unrelated to any provision or interpretation of the contract").

The Third Circuit's treatment of the Heinz non-signatory defendants is, respectfully, too brief and opaque to draw any conclusions regarding whether the conduct alleged was sufficiently intertwined with the contract to warrant application of the non-signatory rule developed in other decisions. Regarding the Heinz defendants, the court wrote only that:

> We also point out that Heinz Italia and H.J. Heinz should not by reason of their corporate relationship with Heinz Dolciaria be able to invoke the arbitration and forum selection clauses, for there is no more reason to disregard the corporate structure with respect to such claims as there would be to disregard it with respect to other legal matters.

Dayhoff, 86 F.3d at 1297.

From this language the district court in this case, and the circuit court by incorporation, extracted the principle that the non-signatory doctrine should never be applied to extend an arbitration clause in a contract signed by a corporate subsidiary to a non-signatory parent corporation. *Ceska Sporitelna, a.s. v. Unisys Corp.*, C.A. No. 96-4152, 1996 U.S. Dist. LEXIS 15435, *17, (E.D. Pa. Oct. 10, 1996) ("Our reading of *Dayhoff*

convinces us that the decision did not turn on the amount of involvement [the non-signatories] had with the License Agreement containing the arbitration clause but solely on the corporate relationship between [non-signatories and signatories] which the Court refused to disregard."), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997).

If this Court agrees that arbitration clauses are appropriately extended to non-signatories in order to protect such dispute resolution agreements against clever pleading, a proposition that has been accepted in some form by virtually every court that has addressed the issue, then there is no basis for discarding that rule in the parent-subsidiary posture that the lower courts treated as dispositive in the Unisys-CS case. Other courts have applied the non-signatory rule to parties in that same posture. *Sunkist Soft Drinks*, 10 F.3d at 757-58; *J.J. Ryan & Sons, Inc.*, 863 F.2d at 320-21; *Vitzethum*, 1996 WL 19062; *In re Salomon Inc. Shareholders' Derivative Litig.*, No. 91 Civ. 5500 (RPP), 1995 WL 533595 (S.D.N.Y. Sept. 30, 1994); *cf. Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988) (applying forum selection clause to non-signatory parent corporation). The close affiliation has indeed been treated as a reason militating in favor of applying the rule. *Vitzethum*, 1996 WL 19062, * 6 (fact that the signatory was a wholly-owned subsidiary of the non-signatory rather than simply an affiliate was a compelling reason supporting arbitrability).

This conflict in the circuits is reason enough to warrant granting certiorari in order for this Court to establish a uniform rule for extending arbitration clauses to non-signatory corporate affiliates. As a matter of *national* commerce, the sanctity of arbitration clauses should not turn on the circumstance of where a corporation is subject to personal jurisdiction. In addition, as a matter of *national* and *international* commerce, the parent-subsidiary posture is the most logical context for applying the non-signatory rule. Since a foreign subsidiary is usually the most efficient and sometimes the only mechanism for doing business in foreign markets, a non-signatory parent corporation will always be available as a litigation target. If non-signatory parents cannot avail themselves

of the arbitration mechanism required by the transactions about which they are sued, those clauses, as a practical matter, become meaningless.

IV. MULTINATIONAL CORPORATIONS HAVE NO MEANS OF CONTRACTING FOR BINDING ARBITRATION IN THE ABSENCE OF A BROAD NON-SIGNATORY DOCTRINE

If this Court adheres to prior precedent regarding the need for businesses participating in international commerce to be able to control prospectively where, and under what laws and procedures, disputes are to be decided, and agrees that multinational corporations must have some mechanism for insuring that such agreements cannot be avoided by tactical pleading, the question arises whether, in the absence of the practical non-signatory rule advocated by petitioner Unisys and *amici* on this brief, corporations could arrange their transactions to achieve those objectives.

According to the formalistic approach to contract interpretation and corporate identity articulated in *Dayhoff* and in the Unisys-CS case, the only type of prospective agreement to arbitrate that would insure that disputes involving a corporate affiliate of a contract party are directed to arbitration regardless of how the claim is pleaded would be (a) a contract signed by all entities comprising the corporation; or (b) a contract signed only by the parent, which would become the principal and sole signatory on all transactions. Requirement of either practice as a condition of controlling dispute resolution fora will throw current international business practice into turmoil. There are numerous business reasons for acting through a subsidiary in foreign markets, all of which will be negated if the corporate parent becomes a contract signatory.

It may be a legal impossibility for a United States corporation to be a contract party in some foreign countries. Some countries have a legal requirement that all entities doing business locally be licensed, incorporated and/or physically located in that country. Yitzhak Hadori, *The Structure of the Private Multinational Enterprise*, 71 Mich. L. Rev. 729, 761 (1973)(in some instances "domestic incorporation is obligatory"); P.T.

Muchlinski, *Multinational Enterprises and the Law* 44 (1995)("[T]he host state may use its regulatory power to require that the foreign firm supply the market through the licensing of a local firm.") Under that scenario, the United States corporate affiliate would have no legal right to join the contract, even if it does so in unison with a subsidiary.

More prevalent than such absolute obstacles to a United States corporation directly doing business in foreign countries are practical obstacles that require the use of a foreign subsidiary. Some countries levy such severe tariffs, import duties, or other conditions that a business subject to them cannot sell their products competitively in the market without a foreign subsidiary. P.T. Muchlinski, *Multinational Enterprises and the Law* 44 (1995) ("'[T]ariff jumping' has proved to be a significant historical reason for firms setting up production subsidiaries in host countries."); Cynthia Day Wallace, *Legal Control of the Multinational Enterprise* 69 (1982)("While the governments of developing states generally insisted on local production as a condition of entry, or imposed such high tariffs that a local plant became the only viable means of entry, the governments of industrialized nations might require purchasers under their direct influence . . . to agree to purchase their equipment only from companies with local plants, thus discouraging pure imports, licensing or assembly facilities, and encouraging local production.") Moreover, where much of the value added to a product occurs during assembly, a multinational can reduce import duties by having the domestic corporation export parts to the foreign subsidiary, which assembles the parts into a finished product in the host country. In addition, strategically located corporations can benefit from preferential treatment for exports and imports within certain regions. Nasrollah S. Fatemi, Gail W. Williams, Thibaut De Sain-Phalle, eds. *Multinational Corporations: The Problem and the Prospects* 38 (1976).

In addition to the legal and practical obstacles to having United States corporations directly sell into foreign countries, such a practice would damage numerous business practices currently authorized and encouraged by the law. For example, corporations establish subsidiaries to seize advantages, such as

low corporate income taxes, that foreign countries establish to induce foreign investment. Fatemi, *supra* at 38; Muchlinski, *supra* at 44 ("[T]he host state may relinquish its power to restrict entry and establishment and may offer investment incentives to induce the [multinational enterprise] to invest.")

United States corporations also receive a tax deferral of profits earned by subsidiaries until such time as those profits are repatriated back to the United States because only United States corporations, not their foreign subsidiaries, are considered subject to the taxing jurisdiction of the United States. I.R.C. §§ 61(7), 881-82; Fatemi, *supra* at 45, 130; Hadori, *supra* at 760. If a United States corporation was a signatory to a contract then it would be immediately subject to United States taxation for any income made on the project. Asim Bhansali, Note, *Globalizing Consolidated Taxation of United States Multinationals,* 74 Tex. L. Rev. 1401, 1403 (1996)("[A] corporation that conducts its foreign operations through a branch office rather than a subsidiary must pay current U.S. taxes on all of its income, without regard to source.")

Finally, high among the efficiencies achieved is protection of intellectual property. By utilizing foreign subsidiaries, a United States corporation is able to protect intellectual property rights by transferring its know how to a business entity, the subsidiary, which it owns, and which will have standing in the host country to assert claims on the patent. P.J. Buckley and M. Casson, *The Future of the Multinational Enterprise* 2 (1991); Muchlinski, *supra* at 431 ("[I]f the owner has the ability to do so, it may prefer direct investment over licensing, as this permits closer control over the use of the technology and is more likely to preserve its confidential nature."); Fatemi, *supra* at 38 (listing patent protection as a major factor motivating corporations to establish foreign subsidiaries).

It is likely that parties such as CS trying to resist arbitration would interpose that the multinational corporation must choose between the benefits that accrue to it by having subsidiaries exist as distinct entities, and the disadvantage of not being covered by the dispute resolution mechanisms contracted for by the subsidiary. The district court, quoting *Dayhoff,* stated that "there is no more reason to disregard the cor-

porate structure with respect to such claims as there would be to disregard it with respect to other legal matters." 1996 U.S. Dist. LEXIS, * 14. What this argument ignores is that in cases where the claim against the non-signatory is intertwined with the contract containing the arbitration clause, it is the plaintiff that has ignored the corporate structure by pleading its claim against a party with which it did not contract. That circumstance is particularly glaring in this case where CS has not even bothered to sue in any forum the corporate entity with which it did contract, and whose alleged failure to deliver is, by definition, the gravamen of CS's fraud suit in federal district court.

It cannot even be questioned that in a large transaction such as the one that the parties entered here, CS was aware that the products to be delivered were developed, manufactured, and marketed by numerous entities in the Unisys structure in addition to the small subsidiary with which CS contracted. The fact that CS contracted with a particular Unisys subsidiary reflects a commitment by *both* parties that CS's business and legal relationship is with that subsidiary, not other parts of Unisys' corporate structure. Accordingly, when disputes arise out of the transaction, the dispute is properly framed as between CS and the particular entity with which it contracted. What CS has done here is what the non-signatory rule is designed to stop: "escape enforcement of the arbitration agreement simply by suing the parent . . . rather than [the subsidiary]." *Vitzethum*, 1996 WL 19062, * 7; *see also Sam Reisfeld & Sons*, 530 F.2d at 681 ("If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.")

The non-signatory rule removes the incentive for parties committed to arbitration to disregard corporate structure in their pleadings for the purpose of avoiding arbitration, and thereby allows multinational corporations to adhere to the legal regulations and enjoy the business advantages that caused them to act through a foreign subsidiary, confident that the dispute resolution mechanism contracted for binds the transaction. In the absence of the rule, corporations have no

way of shielding their transactions from the "legal no-man's land", *Scherk*, 417 U.S. at 517, that would apply to most disputes arising out of contracts that were drafted with an intent to achieve legal certainty as to how disputes would be resolved.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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